

RECEIVED

BEFORE THE
TENNESSEE REGULATORY AUTHORITY II

March 11, 2005 A. DOCKET ROOM

*In re: Formal Complaint by King's Chapel
Capacity, LLC Against Tennessee Wastewater
Services Regarding Abuse of its CCN*

)
)
)
)

Docket No. 05-00016

**MOTION TO DISMISS OR, IN THE ALTERNATIVE,
TO HOLD IN ABEYANCE**

SUMMARY

This Complaint filed by King's Chapel Capacity, LLC ("King's Chapel") against Tennessee Wastewater Services, Inc. ("TWS") raises issues which, as far as can be determined from what the Complainant describes as his four "demands," concern matters which have already been raised by King's Chapel in Docket 04-00335 and grow out of a contract dispute between King's Chapel and TWS. As the Authority is aware, TWS filed suit last year against King's Chapel in the Chancery Court of Williamson County to resolve these contractual issues, and the Authority has suspended further proceedings in Docket 04-00335 pending the outcome of that lawsuit. See Hearing Officer's orders of December 17, 2004, and December 30, 2004, in Docket 04-00335. (The Hearing Officer's orders were subsequently affirmed by the TRA Directors.) Because this Complaint raises similar issues which are now pending before the Court, TWS respectfully asks that the TRA dismiss this Complaint, without prejudice, until after the Court has ruled or, in the alternative, that the Authority suspend further proceedings in this docket pending the outcome of the Chancery Court proceedings.

BACKGROUND

Because of the extensive filings in Docket 04-00335, it is not necessary to repeat here the factual and procedural history of the dispute between TWS and King's Chapel. That background is also well summarized in the two orders issued by the Hearing Officer on December 17 and December 30, 2004. In sum, TWS is a state-certified wastewater provider which holds a certificate of convenience and necessity to provide service in various parts of Tennessee, including the site of a proposed subdivision in Williamson County being developed by Mr. John Powell and his partners. TWS contracted with Mr. Powell to build and operate a wastewater system to serve the new subdivision. The system is now substantially complete and partially paid for but Mr. Powell has refused to pay the balance due. Instead, he and his and partners have formed a new company, King's Chapel, and are actively trying to take from TWS both the ownership of the system and the legal right to own and operate it as a public utility. As part of that strategy, King's Chapel has applied to the TRA for a certificate to own and operate the new system (Docket 04-00335) and has filed complaints about TWS with the Tennessee Department of Environment and Conservation, the Consumer Advocate Division of the Office of the Attorney General and, now, the TRA. TWS, in turn, has filed suit against King's Chapel in Williamson County Chancery Court seeking enforcement of the contract between Mr. Powell and TWS and accusing Mr. Powell and his partners of engaging in a civil conspiracy to deprive TWS of its property. King's Chapel filed an answer to the suit, denying the validity of the contract, and a counter-claim accusing TWS of various violations of Tennessee's Consumer Protection Act.

On December 17, 2004, TRA Hearing Officer Jean Stone issued an Order holding in abeyance the application of King's Chapel (Docket 04-00335) pending the outcome of proceedings in Williamson County Chancery Court and before TDEC. Shortly thereafter, TDEC

also announced that it would also suspend further proceedings regarding this dispute until after the Chancery Court had ruled. Following the decision by Ms. Stone (which was subsequently affirmed by the TRA), Mr. Powell, representing King's Chapel, filed this Complaint against TWS. Although Mr. Powell states that the "monopoly abuse issues" raised in the Complaint are separate from the issues raised in Docket 04-00335, one can easily see that the allegations in both proceedings are largely identical. More importantly, it is readily apparent that the issues raised in the Complaint arise from a contract dispute which is beyond the jurisdiction of the TRA but will be resolved in the Chancery Court lawsuit.

ARGUMENT

1. The first "demand" in the Complaint alleges that Mr. Powell did not willingly sign the contract with TWS for the construction of the new wastewater system. According to the Complaint, Mr. Powell only agreed to sign the contract because TWS claimed that it had been granted a monopoly by the TRA over the provision of sewer service in this area and that no service would be provided to the proposed subdivision unless Mr. Powell agreed to hire TWS to build the system and pay the allegedly excessive price demanded by TWS.

These allegations, which are also set forth at pp. 12-13 of the Response of King's Chapel to the Petition to Intervene filed by TWS in Docket 04-00335, are untrue, as explained in the Answer filed by TWS. But true or not, it is not clear what action King's Chapel is asking the Authority to take in response to these charges or what jurisdiction the TRA has to determine the validity of the contract between TWS and King's Chapel based on discussions which allegedly occurred before the contract was signed.

To the contrary, all issues regarding the validity of the contract, including the claims by Mr. Powell that he was coerced into signing the agreement, are now squarely before the Chancellor in Williamson County. Even King's Chapel agrees that the Court, not the TRA, is

the proper place to resolve these contract issues. As King's Chapel has previously told the Authority, "The construction contract is not the proper subject of review by the TRA TWS's redress is before a court of law to adjudicate issues between TWS and Powell LLC relative to the contract." "Response of King's Chapel to Petition to Intervene" at 6 and 17. The only apparent reason for Mr. Powell to claim that he was forced into signing the contract with TWS is so that he can argue to the Court that he only agreed to the contract under "duress" and, therefore, that the contract should not be enforced. That, in fact, is precisely the argument that Mr. Powell is now raising in the Chancery Court. See "Answer and Affirmative Defenses" filed by King's Chapel in Williamson Chancery Court at p. 5. (A copy of this filing is attached.) The Chancellor will therefore determine whether TWS made any representations about "having exclusive monopolistic rights" to serve the area and whether Mr. Powell, because of those representations, should be excused from performance under the contract.

2. The second "demand" in the Complaint also arises from the parties' contract dispute. King's Chapel claims that it was forced to agree to pay excessive "inspection fees" and that the construction work itself was not performed by a licensed contractor. Both parties agree, however, that the issue of what, if any, inspection fees are owed to TWS under the contract is a matter for the Court, not the TRA, to determine.¹ Similarly, the issues of whether TWS used an unlicensed contractor and whether that abrogates the contract are also squarely before the Court. See "Counter-Claim Number 1" filed by King's Chapel (copy attached). Neither issue belongs before the TRA or in this Complaint.

¹ See "Amended Motion to Dismiss" filed by King's Chapel in Chancery Court and attached to the response of King's Chapel to the Motion of TWS to Hold Proceedings in Abeyance. King's Chapel stated that the "Court should retain jurisdiction of the construction contract . . . to resolve issues of monies that may still be owed for construction, inspection, maintenance, and repair of the wastewater facility."

3. The third "demand" in the Complaint alleges that TWS wrongly required King's Chapel to be responsible for posting the performance bond required by Williamson County and to pay the costs related to the bond. Again, these allegations are untrue. But whether true or not, the obligation of King's Chapel to post the bond is explicitly set forth on p. 2 of the parties' contract.² As previously noted, even King's Chapel agrees that it is for the Court, not the TRA, to determine the validity of the contract and what monies are owed under it. The Court will therefore determine whether King's Chapel must pay for the Williamson County bond as it agreed to do in the contract.

4. There is a fourth "demand" in the Complaint but it does not include any specific charges against TWS. It states only that the practices described in the first three paragraphs have been "systematic," "occurred over a long period of time," and have resulted in "significant overcharges to TWS customers through higher lot prices."

As previously noted, the allegations in the first three paragraphs all arise from the parties contract dispute and are currently at issue in the Chancery Court suit. The Court, not the TRA, will determine whether to enforce the contract and what monies are owed by King's Chapel.

CONCLUSION

Because the allegations in the Complaint are now pending in Court and, as the parties apparently agree, beyond the jurisdiction of the TRA, the agency should dismiss the Complaint. Depending upon the outcome of the Williamson County suit and the pending proceeding at TDEC, Mr. Powell can always re-file his Complaint if any TRA action is necessary. In the alternative, the TRA should take no further action in this docket pending the outcome of the Chancery Court suit.

² The contract states, "Developer will be responsible for posting all performance bonds and cost related to such bonds required by Williamson County concerning Meadowbrook Wastewater System."

Respectfully submitted,

BOULT, CUMMINGS, CONNERS & BERRY, PLC

By: 

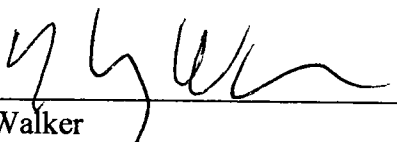
Henry Walker (No.)
1600 Division Street, Suite 700
P.O. Box 340025
Nashville, Tennessee 37203
(615) 252-2363

CERTIFICATE OF SERVICE

The undersigned hereby certifies that the foregoing document has been served upon the following persons by hand delivery or by United States Mail, with proper postage thereon.

King's Chapel Subdivision
John Powell
King's Chapel Capacity, LLC
1413 Plymouth Dr.
Brentwood, TN 37027

This 11th day of March, 2005.



Henry M. Walker

**IN THE CHANCERY COURT FOR WILLIAMSON COUNTY
AT FRANKLIN**

**TENNESSEE WASTEWATER SYSTEMS,
INC. f/k/a ON-SITE SYSTEMS, INC. and
ON-SITE CAPACITY DEVELOPMENT
COMPANY,**

Plaintiffs,

vs.

**J. POWELL DEVELOPMENT, LLC, JOHN
POWELL, ELAINE POWELL, C. WRIGHT
PINSON, ASHBY COMMUNITIES, LLC,
HANG ROCK, LLC, ARRINGTON
MEADOWS, LLC, and KINGS CHAPEL
CAPACITY, LLC,**

Defendants.

Case No.: 31074

ANSWER AND AFFIRMATIVE DEFENSES

COME NOW the Defendants, by and through their undersigned attorneys, and
files this Answer and Affirmative Defenses, and states as follows:

ANSWER

1. Admitted.
2. Defendants do not have a basis of information by which to admit or deny.
3. Admitted in part and denied in part. Defendants admit that John Powell Development, LLC is a non-existent entity, but deny as to all other allegations contained in Paragraph 3 of the Verified Complaint.
4. Admitted.
5. Admitted.
6. Admitted.
7. Admitted.

8. Admitted.
9. Admitted.
10. Admitted.
11. Admitted in part and denied in part. Defendants admit as to count one, but deny as to all other allegations contained in Paragraph 11 of the Verified Complaint.
12. Admitted in part and denied in part. Defendants admit as to count one, but deny as to all other allegations contained in Paragraph 12 of the Verified Complaint.
13. Defendants do not have a basis of information by which to admit or deny.
14. Admitted in part and denied in part. Defendants admit that plat was approved, but deny as to all other allegations contained in Paragraph 14 of the Verified Complaint. Defendants demand strict proof thereof.
15. Admitted in part and denied in part. Defendants admit that John Powell Development, LLC in a non-existent entity, but deny as to all other allegations contained in Paragraph 15 of the Verified Complaint. Defendants demand strict proof thereof.
16. Denied, Defendants demand strict proof thereof.
17. Denied, Defendants demand strict proof thereof.
18. Denied.
19. Denied, Defendants demand strict proof thereof. Defendants further state that TWS was a direct party to the contract and was not "commissioned by On-Site".
20. Admitted.

21. Denied, Defendants demand strict proof thereof.
22. Admitted in part and denied in part. Defendants admit On-Site is not a licensed contractor, but deny as to all other allegations contained in Paragraph 22 of the Verified Complaint. Defendants demand strict proof thereof.
23. Denied, Defendants demand strict proof thereof.
24. Denied, Defendants demand strict proof thereof.
25. Denied, Defendants demand strict proof thereof.
26. Admitted in part and denied in part. Defendants admit that Kings Chapel filed an application with the TRA requesting a Certificate of Public Need and Convenience, but deny as to all other allegations contained in Paragraph 26 of the Verified Complaint.
27. Denied, Defendants demand strict proof thereof.
28. Denied, Defendants demand strict proof thereof.
29. Admitted and Denied as already answered.
30. Denied, Defendants demand strict proof thereof.
31. Denied, Defendants demand strict proof thereof.
32. Denied, Defendants demand strict proof thereof.
33. Denied, Defendants demand strict proof thereof.
34. Denied, Defendants demand strict proof thereof.
35. Admitted or Denied as already answered.
36. Denied, Defendants demand strict proof thereof.
37. Denied, Defendants demand strict proof thereof.
38. Denied, Defendants demand strict proof thereof.

39. Admitted or Denied as already answered.
40. Admitted in part and denied in part. Defendants admit that TWS is a “Person”, but deny as to all other allegations contained in paragraph 40 of the Verified Complaint.
41. Denied, Defendants demand strict proof thereof.
42. Admitted or Denied as already answered.
43. Denied, Defendants demand strict proof thereof.
- Any allegation not specifically admitted is denied.

AFFIRMATIVE DEFENSES

Defendants, pursuant to Tennessee Rules of Civil Procedure, Rule 12.02, affirmatively states the following defenses:

First Affirmative Defense: **Illegality- Unlawful Contract.**

The Contract as offered to this Court is “unlawful” pursuant to Tennessee Code Annotated Sections § 62-6-103 or § 62-37-104

T.C.A. §62-6-103. License requirement — Recovery of expenses by unlicensed contractor. “ (a)(1) ...It is unlawful for any person, firm or corporation to engage in or offer to engage in contracting in the state, unless such person, firm or corporation has been duly licensed under the provisions of this chapter, as hereinafter provided. ... ”

Second Affirmative Defense: **Violation of the Consumer Protection Act.**

The legislature enacted an ACT to amend Tennessee Code Annotated, Title 47, Chapter 18 and Title 62, Chapter 6, relative to consumer protection violation for misrepresentation of unlicensed contractors as licensed contractors. To wit:

Tennessee Code Annotated, Sections §62-6-102, §62-6-103 et seq. *"and prohibited under Consumer Protection Act §47-18-104(b), as amended by creating a new subdivision: () Representing that a person is a licensed contractor when such person has not been licensed as required by § 62-6-103 or § 62-37-104; or, acting in the capacity of a "contractor"'"*

Third Affirmative Defense: **Accord and Satisfaction (T.R.C.P. § 8.03)**

Defendants affirmatively state that Plaintiff, admitting payment of \$250,000 has been fully and/or over paid pursuant to applicable statutes limited the recovery of unlicensed contractors. See T.C.A. §62-6-103, in relevant part:

T.C.A. §62-6-103. License requirement — Recovery of expenses by unlicensed contractor.

(b) Any unlicensed contractor covered by the provisions of this chapter shall be permitted in a court of equity to recover actual documented expenses only upon a showing of clear and convincing proof.

Forth Affirmative Defense: **Duress (T.R.C.P. § 8.03)**

Plaintiffs represented themselves as having exclusive monopolistic rights to operate a sewer wastewater plant and would not operate the plant unless a construction and utility company (now known to be unlicensed) completed the construction services and would thereupon also refuse to provide operating services unless the one or more of the Defendants posted underlying assets for Plaintiff, TWS bonding requirements to operate a plant. Plaintiff, notwithstanding, demands that one or more of the Defendants make an unlawful payment to unlicensed contractors before TWS will agree to operate the facility.

Fifth Affirmative Defense: **Fraud.** (T.R.C.P. § 8.03)

Plaintiffs have by fraud represented themselves both corporately and individually as licensed contractors and as such solicited and received payments under a construction contract. Defendants reasonably relied upon such representations and have been injured and damaged thereby.

Sixth Affirmative Defense: **Failure of consideration.** (T.R.C.P. § 8.03)

Plaintiffs have failed to perform their obligations to Defendants to build a sewer plant and demand lawful payment therefore. Such conduct constitutes failure of the consideration upon which Plaintiffs claims are made herein.

Seventh Affirmative Defense: **Payment.** (T.R.C.P. § 8.03)

Plaintiffs have admitted payment of \$250,000 and Defendants would affirmatively state that such payment meets or exceeds the amount due pursuant to T.C.A. 62-6-013.

Eighth Affirmative Defense: **Waiver.** (T.R.C.P. § 8.03)

Plaintiffs have by their unlawful conduct cited herein, waived any rights demanded under the Complaint filed herein.

Ninth Affirmative Defense: **Statute of Frauds.** (T.R.C.P. § 8.03)

Plaintiffs come to this Court seeking a transfer, forfeiture and/or condemnation of Defendants' property without any writing or memorandum signed by the owner of the property or its representative in violation of the express provision of the Statute of Frauds TCA §29-2-101, set out in relevant part below:

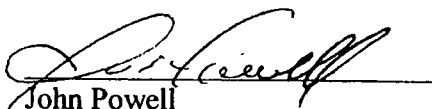
TCA §29-2-101. Writing required for action. —

(a) No action shall be brought:...

(4) Upon any contract for the sale of lands, tenements, or hereditaments, or the making of any lease thereof for a longer term than one (1) year; or

(5) Upon any agreement or contract which is not to be performed within the space of one (1) year from the making of the agreement or contract; unless the promise or agreement, upon which such action shall be brought, or some memorandum or note thereof, shall be in writing, and signed by the party to be charged therewith, or some other person lawfully authorized by such party....

I, JOHN POWELL, being first duly sworn, do hereby make oath and affirm that I have read the foregoing Answer and Affirmative Defenses, know the contents thereof, and that the same is true and correct to the best of my knowledge, information and belief.

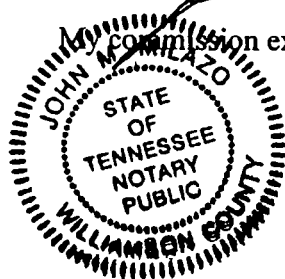

John Powell

STATE OF TENNESSEE)
)
COUNTY OF WILLIAMSON)


Sworn and subscribed before me
this the 4th day of January, 2005.


Notary Public

My commission expires: 2/22/05



Respectfully Submitted:


F. Shayne Brasfield, BPR 019053
Brasfield & Milazo, PC
109 Cleburne Street
Franklin, Tennessee 37064
(615) 599-7719

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was sent via United States Mail, postage prepaid, to;

Jere N. McCulloch, Esq.
Rochelle, McCulloch & Aulds
109 Castle Heights Avenue North
Lebanon, TN 37087

and

Anne C. Martin, Esq.
Bone Mcallester Norton, PLLC
Kenneth M. Larish, Esq.
511 Union Street, Suite 1600
Nashville, TN 37219

On this 4th day of January, 2005.


F. Shayne Brasfield

**IN THE CHANCERY COURT FOR WILLIAMSON COUNTY
AT FRANKLIN**

**TENNESSEE WASTEWATER SYSTEMS,
ET. AL.**

Plaintiffs/Counter-Defendants,

vs.

J. POWELL DEVELOPMENT, LLC, ET. AL.

Defendants/Counter-Plaintiffs.

vs.

**CHARLES PICKNEY, PICKNEY
BROTHERS, INC.**

Case No.: 31074

COUNTER-COMPLAINT

COUNT I- UNFAIR AND DECEPTIVE PRACTICES ACT

1. The Defendants ("Counter-Plaintiffs") sue the Plaintiffs, Tennessee Wastewater Systems, Inc. ("TWS"), On-Site Capacity Development Company, ("OCDC"), ("Counter-Defendants") and Charles Pickney and Pickney Brothers, Inc. (Third Party Defendants), pursuant to Title 47 Commercial Instruments and Transactions Chapter 18 Consumer Protection Part 1 — Consumer Protection Act Of 1977, as amended by Chapter No. 492 of the Public Acts of 2004, Senate Bill No. 2244, *an Act amending Tennessee Code Annotated, Title 47, Chapter 18 and Title 62, Chapter 6, relative to Consumer Protection for Violation for Misrepresentation of Unlicensed Contractors as Licensed Contractors*, and state as follows:

2. Counter-Defendants solicited and bid for construction work from Counter-Plaintiffs in relation to the construction of a sewer system referred to in the complaint filed herein representing themselves as duly licensed contractors capable of building,

supervising, inspecting and otherwise performing the duties of licensed contractors in the State of Tennessee.

3. Counter-Plaintiffs relied upon such representations, evidenced by the alleged contract attached to Plaintiffs' complaint herein as (Plaintiffs' Exhibit 1, hereinafter referred to as the "construction contract").

4. Counter-Plaintiffs received and paid a \$250,000.00 bill for construction work pursuant to the alleged construction contract. (the billing being attached to Plaintiffs' complaint herein as Plaintiffs' Exhibit 2).

5. Counter-Plaintiffs in reliance upon the representations of Counter-Defendants, through their representative Charles Pickney, that TWS, OCDC and Charles Pickney were licensed to perform the construction work, paid the above referenced bill for \$250,000.00 to OCDC on behalf of OCDC and TWS, as evidenced by Plaintiffs' Exhibit 3 to their complaint and as alleged in paragraph 16 of the complaint.

6. Neither Counter-Defendant, was a licensed contractor, as represented.

7. Counter-Defendants' conduct in misrepresenting themselves to Counter-Plaintiffs to be "licensed contractors" when in fact they were not, constituted the employment of unfair and deceptive acts and practices which are declared "unlawful" pursuant to TCA §47-18-109, and in violation of TCA §47-18-104(b), (as amended) to wit:

"Representing that a person is a licensed contractor when such person has not been licensed as required by § 62-6-103 or § 62-37-104; or, acting in the capacity of a "contractor" as defined in Tennessee Code Annotated, §§ 62-6-102(3)(A), 62-6-102(5) or 62-37-103(5), and related rules and regulations of the State of Tennessee (or any similar statutes, rules and regulations of another state) while not licensed;"

8. Counter-Plaintiffs have suffered an ascertainable loss of money and property within the contemplation of the Counter-Defendants, will continue to suffer ascertainable losses as a result of the use and employment by Counter-Defendants of an unfair or deceptive acts or practices declared to be unlawful under the code sections cited herein and sequels thereto.

9. Counter-Plaintiffs are therefore entitled to a private right of action against Counter-Defendants pursuant to TCA §47-18-109;

TCA§47-18-109. Private right of action-Damages-Notice to division.
(a)(1) Any person who suffers an ascertainable loss of money or property, real, personal, or mixed, or any other article, commodity, or thing of value wherever situated, as a result of the use or employment by another person of an unfair or deceptive act or practice declared to be unlawful by this part, may bring an action individually to recover actual damages.

10. Counter-Defendants' use or employment of the unfair or deceptive act or practice was a willful or knowing violation of Tennessee laws cited herein and Counter-Plaintiffs are entitled to *"(3) times the actual damages sustained and may provide such other relief as it considers necessary and proper..."* (see Section Three below):

SECTION 2. Tennessee Code Ann., Title 62, Chapter 6, Part 1:
§62-6-136. (a) It is unlawful for any person, firm or corporation to represent itself as a licensed contractor, or to act in the capacity of a "contractor" as defined in Tennessee Code Annotated, §§ 62-6-102(3)(A), 62-6-102(5) or 62-37-103(5), and related rules and regulations of the State of Tennessee (or any similar statutes, rules and regulations of another state) while not licensed, unless such person, firm or corporation has been duly licensed under § 62-6-103 or § 62-37-104.

(b) In addition to the penalties set out in §§ 62-6-120, 62-37-114 or 62-37-127, a violation of this section shall be construed to constitute an unfair or deceptive act or practice affecting the conduct of trade or commerce under the Tennessee Consumer Protection Act, compiled in Title 47, Chapter 18, Part 1, and as such the private right of action remedy under such act shall be available to any person who suffers an ascertainable loss of

money or property, real, personal, or mixed, or any other article, commodity, or thing of value wherever situated as a result of such violation.

(c) An individual who violates this section and would, but for the provisions of this section, have limited liability as owner of an entity having limited liability protection, including but not limited to a corporation, is personally liable for such individual's own representations, acts or omissions to the same extent as if that individual rendered such representations, acts or omissions as an individual.

SECTION 3.

(2) The action may be brought in a court of competent jurisdiction in the county where the alleged unfair or deceptive act or practice took place, is taking place, or is about to take place, or in the county in which such person resides, has such person's principal place of business, conducts, transacts, or has transacted business, or, if the person cannot be found in any of the foregoing locations, in the county in which such person can be found.

(3) If the court finds that the use or employment of the unfair or deceptive act or practice was a willful or knowing violation of this part, the court may award three (3) times the actual damages sustained and may provide such other relief as it considers necessary and proper.

(4) In determining whether treble damages should be awarded, the trial court may consider, among other things:

(A) The competence of the consumer or other person;

(B) The nature of the deception or coercion practiced upon the consumer or other person;

(C) The damage to the consumer or other person; and

(D) The good faith of the person found to have violated the provisions of this part.

(b) Without regard to any other remedy or relief to which a person is entitled, anyone affected by a violation of this part may bring an action to obtain a declaratory judgment that the act or practice violates the provisions of this part and to enjoin the person who has violated, is violating, or who is otherwise likely to violate this part; provided, that such action shall not be filed once the division has commenced a proceeding pursuant to § 47-18-107 or § 47-18-108.

11. Counter-Defendants conduct complained of herein is even more egregious since they used the State entitlement of a Certificate of Need to operate a sewer plant in order to coerce the payment pursuant to the unlawful construction contract by refusing to provide service as an operator unless payment was made upon the unlawful construction contract.

12. Counter-Plaintiffs specifically notified Counter-Defendants that time was of the essence and that they would lose substantial amounts of money in interest payments and lost builder contracts if Counter-Defendants delayed the completion of the project. Counter-Defendants have used contrivance, concealment, misrepresentation and delay as a tactic to coerce payment upon the unlawful construction contract described herein and attached to the Plaintiffs' complaint.

13. The project must now be inspected and completed by licensed contractors causing additional injury and damages.

14. Counter-Defendants, boldly represent to this Court that they have and intend to continue such unlawful conduct throughout Williamson County, in contracting as unlicensed contractors with the public having Pickney Brothers, Inc., non parties to the construction contract complete the work, to wit *"On-Site's and TWS's intentions were, as they had in other Williamson County, Tennessee wastewater projects, to use Pickney Bros., its related entity that is a licensed general contractor, to do the actual construction work on the System The Contract provided to Powell Development to pay On-Site and TWS a flat fee of \$550,000 during the course of construction of the sand filtration and drip irrigation portions of he System, and additional fees of \$3,366 per Meadowbrook lot..."* (see ¶16 of Plaintiffs' complaint).'

15. As evidenced above, Counter-Defendants were fully aware that a licensed contractor was required to perform the construction work but knowingly and intentionally contracted as non-licensed contractors with Counter-Plaintiff and others throughout Williamson County with Counter-Defendants themselves representing that they were performing the construction work and demanding payment therefore, not Pickney Brothers, Inc.

16. Counter-Defendants seek the endorsement of this Court, in seeking a ruling that such conduct is in fact lawful and continue in this unlawful process pending an actual ruling from this Court. Unless Counter-Defendants are enjoined from such conduct pending final determination of this Court the public at large will suffer.

17. Counter-Plaintiffs have performed all conditions precedent to the filing to this action.

COUNT II-CIVIL CONSPIRACY

18. Counter-Plaintiffs incorporate the factual allegations set forth in paragraphs 1-17 herein above by reference.

19. Counter-Defendants allege a contract for the construction of a sewer plant which required that the parties to the contract undertaking the performance of construction services, be licensed contractors with all Counter-Defendants and Third Party Defendant representing that they were all duly licensed to complete the construction work.

20. Neither TWS, OCDC or Third Party Defendant, Charles Pickney were licensed contractors.

21. Counter-Defendants allege in their complaint that it was always their "intent" not to complete the work as contracted for but to have Third Party Defendant,

Pickeny Brothers, Inc., a non-party to the construction contract complete the work. (see ¶ 16 of the Complaint)

22. It is unlawful for any person or entity to bid, offer to bid, and/or contract to perform contracting services without a license. (see TCA 62-6-103 set out above)

23. Counter-Defendants and Third Party Defendant conspired to defraud Counter-Plaintiffs and defeat the licensing laws and as a result, each Counter-Defendant and Third Party Defendant, with the knowledge and intent of the other, committed an act declared unlawful under TCA 62-6-103.

24. At all times relevant herein, Counter-Defendants and Third Party Defendant acted in concert through their separate roles within their deceptive scheme to engage in contracting without a license and to defeat the licensing laws of this State.

25. As a direct and proximate result of the Counter-Defendants and Third Party Defendant's concerted action as set forth herein, Counter-Plaintiffs have sustained and will continue to sustain damages and injuries for which they are entitled to recover compensatory damages in the amount of \$1,249,000.00 or such amount as may be proved at trial and punitive damages.

COUNT III- INJUNCTIVE RELIEF

26. Counter-Plaintiffs incorporate paragraphs 1 through 25 as if fully set forth herein.

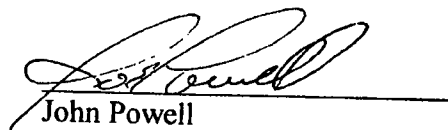
27. Counter-Plaintiffs and the public at large will, without the granting of a temporary and/or permanent injunction, continue to suffer irreparable injury for which no amount of damages are sufficient to compensate them.

28. Counter-Plaintiff therefore requests that this Court enter a temporary injunction prohibiting Counter-Defendants and Third Party Defendants from engaging in or offering to engage in construction services without a license.

WHEREFORE, PLAINTIFFS PRAY:

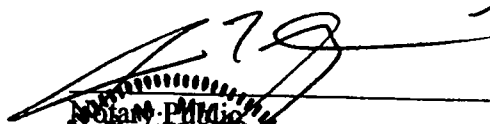
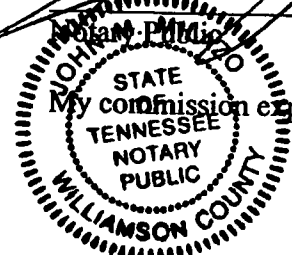
1. That Plaintiffs be awarded their actual damages incurred including any and all damages proved at trial and available as a matter of law.
2. That Plaintiffs be awarded their reasonable attorney's fees in this cause.
3. For any other further and general relief that this Honorable Court deem fit.

I, JOHN POWELL, being first duly sworn, do hereby make oath and affirm that I have read the foregoing Answer, Affirmative Defenses and Counter-Claim, know the contents thereof, and that the same is true and correct to the best of my knowledge, information and belief.


John Powell

STATE OF TENNESSEE)
)
COUNTY OF WILLIAMSON)

Sworn and subscribed before me
this the 4th day of January, 2005.



My commission expires: 2/22/05

Respectfully Submitted:

A handwritten signature in black ink, appearing to read 'F. Shayne Brasfield', written over a horizontal line.

F. Shayne Brasfield, BPR 019053
Brasfield & Milazo, PC
109 Cleburne Street
Franklin, Tennessee 37064
(615) 599-7719